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No. 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CALUMET HARBOR TERMINALS, INC., and NORTH PIER TERMINAL COMPANY,

Appellants,

VS.

NORFOLK AND WESTERN RAILWAY COMPANY, CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, and PULLMAN RAILROAD COMPANY,

Appellees.

On Appeal From The United States District Court For The Northern District Of Ohio, Eastern Division

BRIEF OF APPELLANTS, CALUMET HARBOR TERMINALS, INC., NORTH PIER TERMINAL COMPANY.

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August, 1966

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OPINIONS BELOW

The opinion of the district court (R. 1404) is reported at 241 F. Supp. 974. The report of the Interstate Com-

merce Commission, dated October 5, 1959 (R. 263), its first supplemental report (R. 383), and its second supplemental report (R. 504) are printed at 307 I.C.C. 493; 312 I.C.C. 277; and 317 I.C.C. 502, respectively.

JURISDICTION

Complaints were brought in a three-judge federal district court by the New York, Chicago and St. Louis Railroad Company (Nickel Plate)[1] and by Chicago, Rock Island and Pacific Railroad Company (Rock Island) and Pullman Railroad Company (Rock Island)[2] under 28 U.S.C. §§ 1336, 2284, 2321-2325, to annul, enjoin and set aside the orders of the Interstate Commerce Commission.

The judgment of the district court was entered April 30, 1965 (R. 1447). Notice of appeal was filed in the district court by Calumet Harbor Terminals, Inc., and North Pier Terminal Company on June 24, 1965 (R. 1469). This Court noted probable jurisdiction in its order of November 15, 1965 (R. 1473, 382 U.S. 913).

The jurisdiction of the Supreme Court to review the judgment below on direct appeal rests on 28 U.S.C. §§ 1253 and 2101(b). *American Trucking Assos.* v. *Frisco Transp. Co.*, 358 U.S. 133 (1958); *Interstate Commerce Com.* v. *J.-T. Transport Co.*, 368 U.S. 81 (1961).

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[1] By order of November 5, 1964, the lower court granted Nickel Plate's motion to change the designation of plaintiff to Norfolk and Western Railway Company to reflect the acquisition by the latter of the Nickel Plate.

[2] Pullman is a division of Rock Island, and both companies will be referred to simply as "Rock Island."

STATUTES INVOLVED

The pertinent statutes are the declaration of National Transportation Policy, 49 U.S.C., preceding Sections 1, 301, 901 and 1001; and Sections 1(18) and 5(2) of the Interstate Commerce Act, as amended, 49 U.S.C., §§ 1(18) and 5(2) respectively, and Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e). These statutes are reproduced in the Appendix hereto.

QUESTIONS PRESENTED

In October 1956 the Illinois Central Railroad Company and six other railroads filed the first of a series of applications seeking Commission authorization to provide direct service to and from the new harbor facilities being developed by the Chicago Regional Port District at Lake Calumet Harbor, Cook County, Illinois. These applications were prompted in large measure by the prospect of very substantial increases in rail-water traffic becoming available upon completion of improvements to the St. Lawrence Seaway early in 1959. The applications were opposed by Nickel Plate and Rock Island.

Rock Island is the only railroad providing direct service to the Port District's facilities. Nickel Plate, with trackage along the east side of the lake, is in position to serve such facilities or industries as may be developed there in the future.

The following questions are presented by this appeal:

1. Whether the lower court erred in setting aside the Commission's conclusion that Lake Calumet Harbor, Port of Chicago, now served exclusively by Rock Island, re-

quires additional railroad service, as proposed by the applicants.

2. Whether the lower court erred in concluding that the Commission was required, as a matter of due process of law, to grant a hearing to Rock Island and Nickel Plate concerning the terms of an amended lease agreement covering applicants' use of the Port District's tracks, notwithstanding the fact that a similar lease had been offered at the hearing and Rock Island and Nickel Plate had adequate opportunity to cross-examine and present evidence relating thereto.

3. If a further hearing was necessary, did the lower court err in ordering further hearing on all of the issues raised in the proceedings.

STATEMENT OF THE CASE

I. INTRODUCTION

A. LOCATION AND BACKGROUND OF LAKE CALUMET HARBOR

Lake Calumet, located on the southeast side of Chicago, is a natural lake approximately 1.2 miles wide and 2.2 miles in length. It connects with Lake Michigan, on the east, by way of the Calumet River[3] and with the Mississippi River system, on the west, by connection with the Calumet-Sag Channel and the Chicago Sanitary and Ship Canal. (R. 899).

The lake is owned by the Chicago Regional Port District, a municipal corporation created in 1951, and charged with the statutory duties of promoting commerce and developing and improving harbor facilities for the handling of commerce in and through the Port District (R. 565, 568). In furtherance of these powers, the Port District in 1955, initiated the first phase of its harbor development program. That phase, involving an expenditure of $24,000,000, included dredging a portion of the lake, the construction of two 6½ million-bushel grain elevators, three transit sheds[4] totaling 300,000 square feet of space, a back-up warehouse with 200,000 square feet of storage space and 14 miles of railroad tracks (R. 565, 578). Transit Sheds Nos. 1 and 3 and the back-up warehouse are leased and operated by these appellants, North Pier Terminal and Calumet Harbor Terminals (R. 579, 580).

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[3] A map showing the size and general location of Lake Calumet appears opposite R. 1204.

[4] In transportation parlance, a "shed" is any long and narrow building on waterfront properties (R. 723).

The port facilities were designed for the interchange, handling, warehousing and stopping in transit of domestic freight as well as import and export business (R. 569). All of these facilities are public houses operated by licensed public service bodies (R. 595).

B. RAIL SERVICE, PRESENT AND PROPOSED

By resolution adopted in 1954, the Port District declared its policy that the public interest and the interests of prospective tenants and users of the harbor would be best served by making available to them all accessible railroad service on an equal basis and that no monopoly or exclusive privilege should be granted to any single rail carrier to serve Lake Calumet Harbor (R. 565, 566).

Rock Island, by connection with and operation over the tracks of the Port District, is the only railroad providing direct service to the District's facilities (R. 592). Nickel Plate does not operate into the port but has trackage along the east side of the lake and is in position to serve present and future facilities or industries in that area (R. 1205).

By joint application dated October 19, 1956, the Illinois Central and The Pennsylvania Railroad Company (along with subsidiary companies) sought Commission authority, under Section 1(18) of the Act, to construct a new line of railroad approximately 1½ miles long from their existing tracks to a point of connection with the Port District's tracks. These carriers and the Chicago South Shore and South Bend Railroad also filed on that same date an application under Section 5(2) seeking trackage rights over each other's existing tracks and those to be constructed under the Section 1(18) application (R. 15). Similar applications for trackage rights were filed by the Belt Railway Company of Chicago on April 23, 1957, and

by the Michigan Central Railroad Company, the New York Central Railroad Company and Indiana Harbor Belt Railroad Company on September 9, 1957 (R. 67, 147).

II. THE CASE BEFORE THE COMMISSION

Nickel Plate and Rock Island opposed all of the applications. The Board of Trade of the City of Chicago, the Chicago Association of Commerce and Industry, the Port District, North Pier Terminal Company, Calumet Harbor Terminals, and the Secretary of Agriculture intervened and presented evidence in support of the applications (R. 267).

A. THE HEARING AND THE EVIDENCE

A joint hearing on the several applications was held before a hearing examiner beginning September 30, 1957 and was concluded on October 11, 1957 (R. 549). The evidence adduced resulted in a comprehensive record going to the issues of public need for direct, multiple carrier service to the Port District's facilities and the practicality of applicants' proposed operation to and within the harbor.

In a proposed report served July 21, 1958 the hearing examiner recommended that the applicants be granted authority to construct the proposed line of railroad and that trackage rights be authorized as requested (R. 210, 261, 262). The Commission in its report of October 5, 1959, made essentially the same findings of fact as did the hearing examiner and concluded that there was a need for the service proposed but limited its approval to operations up to the Port District's tracks. It held that authority to operate over the District's tracks, which applicants had not sought because they thought it unnecessary, was required before direct service could be rendered to the District's facilities (R. 270, 271, 308, 313, 314).

1. Evidence of Public Convenience and Necessity

The record before the Commission included the following evidence bearing on the issue of public convenience and necessity.

The Chicago metropolitan area includes five counties in Illinois and one county in Indiana, totalling in excess of 3,600 square miles, with a population estimated at 6¼ million (R. 893). Chicago has had a tremendous expansion in industrial facilities since World War II. This expansion has been greater than at any other city in the country (R. 899).

The first regular steamship service was established in 1933 between Chicago and European ports. In 1950, 80 vessels called at the Port of Chicago and during 1956, 21 foreign lines made a total of 264 calls at the port. Export and import overseas traffic increased from 87,000 tons in 1950 to 237,000 tons in 1956. In 1955, the total water-borne traffic to and from Chicago was 71,490,510 tons, which included domestic, overseas and Canadian export and import traffic (R. 894, 895).

The Port of Chicago has been and will continue to be the major Great Lakes general cargo port and beginning with the 1959 shipping season the Port will be a dominant export gateway for grain moving direct to ports abroad and to Montreal for forwarding abroad (R. 920).

Lake Calumet Harbor is the major deep water facility of the Port of Chicago. It is in the heart of the Chicago railroad switching district and is contiguous to major arterial highways (R. 725). The port is a public harbor open to all trucking companies, barge lines and steamships, but it is served directly by only one railroad (R. 730, 731).

The harbor is connected to the Great Lakes by the Calumet River and to the Mississippi River system through the Calumet-Sag Channel and the Chicago Sanitary and Ship Canal (R. 899, map facing R. 1204).

The States of Indiana, Illinois, Iowa, Missouri, Kansas, Nebraska and Colorado, by reason of their proximity to the Port of Chicago, will export a very substantial quantity of grain through that port. In 1956 this area produced 43 percent of all the wheat and 51 percent of all the corn grown in the United States. Substantially lower inland rates are in effect to Chicago from the producing points than are applicable to either the Atlantic or Gulf ports. In view of this disparity in rates much grain may be expected to be diverted from the Atlantic and Gulf ports for movement via Chicago and the St. Lawrence Seaway (R. 774-777). Benefits to grain shippers in the Midwest resulting from their favorable location with respect to Chicago can be nullified if transportation facilities to dockside for large volumes of grain are not available. Service by a single railroad does not appear adequate for a major port. Most Western railroads serving the Midwest grain producing states terminate at Chicago and have extensive switching and classification yards which could be utilized in providing additional service to the Port (R. 777).

Almost every deep water port in the United States has multiple railroad service either through a belt line or through extensive lighterage arrangements (R. 660, 920). At the time of the hearing, canal and lock limitations in the upper St. Lawrence restricted steamship lines to vessels not exceeding 258 feet in length. These ships had a maximum capacity of 180,000 cubic feet and when properly loaded could receive up to 1600 weight tons down to a draft of 14 feet. With the opening of the St. Lawrence

Seaway and a draft of 27 feet available from Montreal into the Great Lakes ports, larger ships with space of 350,000 cubic feet will become available in the Great Lakes overseas trade (R. 916).

The largest vessels will have a capacity of up to 8,000 or 9,000 tons. On the basis of an average of 40 railroad cars per thousand tons of freight, these vessels will require about 350 cars coming in and 350 cars going out for each ship (R. 732).

The world merchant marine has slightly over 6,000 vessels that can navigate the enlarged St. Lawrence Seaway. If only 5 percent of these ships (approximately 300 vessels) come into the Great Lakes on two or three trips a year, there would be 600 to 900 vessels coming into the Port of Chicago each season (R. 918). An efficient, economical interchange of cargo between the land carriers and the water carriers for such a volume of shipping will necessitate a substantially broadened railroad service into and out of Lake Calumet Harbor (R. 918). The larger general cargo vessels represent a capital investment of up to $5,000,000 per vessel. The loss of a single day in the turn-around time of such a vessel is an important item of cost. A continued bad turn-around experience can cause a ship operator to divert cargo to some other port where a better experience is assured (R. 919). The continuity of ship loading and unloading is vital to keep turn-around time to a minimum, and adherence to sailing schedules necessitate highly fluid railroad service for the delivery of export cars as required by the loading pattern and the placement and movement away from the port of import cars (R. 920).

There are many disadvantages to having only a single carrier serving a location. In many cases in-transit privileges are not available; rates are higher; in some cases it is not possible for a facility to compete with a nearby competitor who has multiple carrier service, and frequently special types of cars are not available in sufficient quantities from only one line (R. 725, 726, 728, 729, 745).

The Port District seeks additional railroad service because it means more single-line rates and more two-line rates and services into the harbor area; it would also make available a much greater supply of cars; the possibility of disruption of service because of a strike or other labor differences would be substantially reduced; and it would prove advantageous to the tenants at the Port and improve the prospect of rate adjustments on import-export traffic (R. 588, 589, 613, 614).

At the present time there are 4,405 industries in the Chicago switching district which are served exclusively by one railroad. Of these 202 are served by Rock Island and 34 by the Nickel Plate. If the applications are approved over 1,900 additional industries would receive direct single-line service to the port and the balance of the industries would require, at most, a two-line movement (R. 304, 305). The charges for cross-town movements increase as more rail lines become involved in the haul (R. 662, 663). The difference between the charges for single-line and multiple-line switching rates could be sufficient to divert to the applicants some of the traffic now being handled by motor carriers (R. 741). Further, applicants will be providing line haul services directly into the Port which will result in the elimination of delays connected with the interchange of cars between the long haul carrier and the delivering carriers (R. 753). It will also result in substantial savings by the

applicants of switching charges which they presently absorb on Rock Island deliveries (R. 663).

Approval of the applications will mean direct service from the vast areas served by the applicants' lines (R. 658, 672, 695) and by the 12 owner lines of the Belt Railway (R. 705); twelve times the yard capacity of Rock Island (R. 1411) and a much greater car supply than is now available (R. 1132-1134).

2. Evidence of Applicants' Operating Plan

In applicants' proposal each of the railroads would deliver and receive its cars with its own engines on designated tracks in the Port District yard (R. 681, 682). Operations within the District[5] would be performed in accordance with a proposed joint facilities agreement, under which switching service to the tenants of the Port would be rendered with engines and personnel jointly provided by the applicants (R. 491, 495, 676, 681).

Direct delivery entails less handling and by being in control of the entire movement to the Port the applicants would be in a position to expedite delivery as the occasion demands (R. 679). Under the joint arrangement, applicants' cars would be placed for loading or unloading within the Port much quicker and at less over-all expense than if delivered to the Rock Island (R. 680). Joint facility arrangements, such as here proposed, are a common operating practice in the industry and are economical and practical (R. 682).

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[5] Applicants, believing such authority would not be required, did not request authorization over the Port District's tracks (R. 270, 271). The Commission held such authority was necessary and applicants subsequently filed appropriate supplemental applications (R. 307, 386).

Applicants proposed a lease agreement with the Port District under which they would lease and maintain the tracks and other facilities of the District. The annual rental was to be based on 5 percent of a valuation to be agreed upon, but total rental was not to exceed an amount equivalent to $2.00 per car, loaded or empty, or locomotive handled to or from Port District's property (R. 1135-40).

B. THE COMMISSION'S FINDINGS AND CONCLUSIONS

With the foregoing and other evidence before it, the Commission concluded that the applications, as filed, should be granted. It also held that its approval extended only over the lines of railroad leading to the Port District's tracks, and specifically held that authorization did not extend to operation over those tracks until such time as appropriate applications seeking such authority were filed with it (R. 271, 308, 314).

The Commission found that multiple carrier service would result in greater rail competition, better service, greater car supply and lower rates for the industries on Port District property at Lake Calumet Harbor. It further found that the time had come when additional rail service at the Port was required for the future development of the present industries and those which would be established there in the future (R. 309, 310). The Commission was of the opinion that considering the circumstances, particularly the expansion program now in progress at the Port and the increased amount of rail traffic to be made available there, the additional service was warranted (R. 310, 311).

C. THE COMMISSION'S SUPPLEMENTAL REPORTS AND ORDERS

1. The First Report

On April 6 and 7 and May 18, 1960, the applicants filed various documents as supplements to their original applications so as to request the necessary authority to operate over the existing tracks of the Port District to the extent necessary for applicants to serve the industrial facilities located or to be located on the District's property (R. 386). One of the documents submitted was a revised lease agreement (R. 337-343) which, with one exception, was identical in its principal provisions to the lease agreement originally considered by the Commission (R. 391). The only change was the elimination of the requirement that the Port District obtain applicants' written approval before it could permit any others to operate rail facilities on its property. This was the only provision in the original proposed lease which the Commission had found objectionable (R. 390, 391).

Nickel Plate and Rock Island filed objections to the supplemental applications, arguing, among other things, that hearings were required on such requests (R. 387). The Commission held in its report of September 19, 1960 (R. 383-393) that although the original applications were not broad enough to cover operations within the Port, the applicants made it clear that the only real purpose of the application was to serve the warehouses, elevators and other facilities over the District's tracks (R. 389); that the original proposed lease was introduced in evidence and that the protesting railroads had full opportunity to cross-examine as to its provisions (R. 390, 392); that the Commission had not earlier granted applicants the authority to serve District facilities due to the technical deficiency of the original applications, which deficiency had now been

cured; and that it saw no need for further hearing or to require reintroduction of the same basic evidence which was already in the record (R. 390). The Commission further found that the revised lease was reasonable and adequate to accomplish its intended purpose and stated that any change in the lease provisions would require its prior approval. It concluded that public convenience and necessity required operation by applicants over the Port District's tracks (R. 392, 393).

2. The Second Report

On June 12, 1961 the Port District and applicants executed an agreement for the non-exclusive use of the Port District's tracks and facilities (R. 432-441). This agreement differed in certain respects from the revised lease agreement proposed by applicants and approved by the Commission in its first supplemental report (R. 505).

One change from the lease agreement was the reference to the "use" instead of the "lease" of the District's tracks and facilities. The revision was made to conform to Illinois property law by eliminating any reference to the lease of land. The modified agreement also contained a provision to the effect that it did not apply to industry-owned tracks on the District's property (R. 506).

The basic modification was in the provision relating to annual rental. The lease agreement had provided that rental was to be based on 5 percent of an agreed valuation of the properties involved with a maximum not to exceed an amount equivalent to $2.00 per car, loaded or empty, or locomotives, handled to or from the District's property (R. 340). The modified agreement provided only for a charge of $2.00 for each partially or fully loaded revenue car and for each empty car, other than those involved in an inbound or outbound revenue movement (R. 436, 437).

The Commission approved the modified agreement in its report on November 26, 1962. It rejected Rock Island and Nickel Plate arguments that the reasonableness of the rental could not be determined because the record was deficient as to the future value of the trackage and the traffic volume. The Commission stated that it had never adopted any exclusive formula for determining the reasonableness of trackage rentals; that where non-affiliated parties bargaining at arm's length reached agreement and all parties would benefit financially and where, as here, the protesting railroads' ability to serve the public would not be impaired, the rentals could be considered reasonable (R. 508).

The Commission also held that the centralized supervision agreement (an executed revision of the proposed joint facility agreement) which applicants submitted with the modified use agreement, was to be considered as part of the terms and conditions of the modified agreement. However, since the sole purpose of the supervision agreement was the coordination of applicants' separate services to achieve efficiency in switching within the harbor, which the Commission had already determined was needed, the agreement itself did not require Commission approval (R. 509, 510).

It further held that since it had already determined the general issue of public convenience and necessity only the details of the applicants' operations remained to be approved, and since most of protestants' contentions had been discussed and disposed of in its prior reports, the Commission thought it improper to burden the applicants and others with the expense and time of a further hearing (R. 506). Other changes in the modified agreement were found to be primarily improvements in language and the clarification of the parties' rights and obligations (R. 511).

III. THE LOWER COURT'S DECISION

On April 4 and April 7, 1960, the Nickel Plate and Rock Island, respectively, filed complaints in the District Court for the Northern District of Ohio under 28 U.S.C. §§ 1336, 2284 and 2321-2325 to enjoin and have set aside the Commission's approval of applicants' proposed operation (R. 1172-1185; 1186-1204). The Commission, the applicant railroads and North Pier Terminal and Calumet Harbor Terminals all filed answers in defense of the Commission's orders (R. 1230, 1232, 1235, 1248, 1256).

In its judgment of April 30, 1965, the district court [Circuit Judge Edwards dissenting, in part (R. 1421)] set aside and enjoined the reports and orders of the Commission and ordered the cases remanded to the Commission for a complete rehearing on all the issues (R. 1420, 1447, 1448).

The court dealt with the questions raised in the proceeding as falling into two broad categories—first, those pertaining to the proposed construction and the trackage arrangements up to the property line of the Port District; and, secondly, those issues bearing on operations within the Port District itself (R. 1412). The majority found two fatal flaws in the proceedings and orders of the Commission. It held (1) that the record lacked "ample support" for the Commission's conclusions on the issue of public convenience and necessity (R. 1415) and (2) that Rock Island and Nickel Plate had been denied due process of law (R. 1420). Judge Edwards disagreed with the majority's conclusions respecting the convenience and necessity issue (R. 1437). He agreed that plaintiffs had been denied due process, but he would have limited the rehearing to evidence bearing on the operation within the District (R. 1446).

SUMMARY OF ARGUMENT

The court below dealt with the convenience and necessity aspect of the case separate from the matter of applicants' operation within the Port District. As to the convenience and necessity issue, the court found substantial evidence to support many of the Commission's important findings. We submit that those findings, in turn, were adequate support for the basic and ultimate conclusions of the Commission approving the applications for additional rail service at Lake Calumet Harbor. The majority, however, without any explanation whatever, held that the record did not offer ample support in fact and law for the conclusions of the Commission. It seems patent, in light of the comprehensive record before the Commission, its findings and conclusions, that the majority did not accord the Commission's expert judgment the respect to which it is entitled and substituted its own judgment for that of the administrative body. When it did so, the majority exceeded the proper limits of judicial review of administrative decisions. *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 536.

On the issue of applicants' proposed operation within the Port District, the lower court held that Rock Island and Nickel Plate were denied due process because the Commission refused them a hearing on the supplemental applications. Appellants submit that the court erred in so holding. Section 1(18), which governs applications for construction of new lines of railroad, does not require the Commission to hold a hearing on such applications. That section and Sections 1 (19) and 20a(6), provide, in effect, that the Commission may hold such hearings as it deems fit.

Woodruff v. *United States*, 40 F. Supp. 949 (D. Conn.); *Brotherhood of Locomotive Engineers* v. *United States*, 217 F. Supp. 98 (D. Ohio).

The court's conclusion that the Rock Island and Nickel Plate were bound by the modified use agreement and operating plan is also erroneous. Rock Island has been operating within the Port District for a number of years under arrangements with the District which are not in any way affected by the District's agreement with applicants. Nickel Plate does not serve the District's facilities and it, therefore, is not affected by the revised agreement.

Finally, the court erred in requiring a rehearing on all the issues raised in this proceeding. It considered the two issues as severable, as clearly they are, but its final conclusion erroneously merged the issues and required a complete rehearing. If any further hearing is required, it should be limited to the modified use agreement and not extended to the convenience and necessity phase of the case. The lower court's judgment is erroneous and should be reversed, and the Commission's decision should be upheld.

ARGUMENT

I. The Lower Court Erred in Substituting Its Judgment for that of the Commission on the Issue of Public Convenience and Necessity and in Doing So Exceeded the Proper Limits of Judicial Review.

This case was heard by the lower court on January 24, 1964. On April 10, 1964, Circuit Judge Edwards tendered to the other members of the court a draft opinion which he proposed as the opinion of the court. Judges Connell and Kalbfleisch did not agree with Judge Edwards' conclusion that the Commission should be upheld on the convenience and necessity issue. Nonetheless, they adopted his draft opinion (now his dissenting opinion) on that issue without material changes, except as to the conclusion (R. 1421).

Both majority and the dissenting opinions found substantial support in the record for many of the Commission's important findings (R. 1409-1411, 1431-1434). In Judge Edward's opinion, these findings were adequate to support the Commission's basic and ultimate conclusions We agree. The majority, however, felt the record did not offer ample support in fact and law for the conclusions of the Commission (R. 1415). The opinion does not go beyond that terse statement. There is no discussion or citation of cases offered in explanation of why the majority reached that conclusion.

We are unable to find any rational basis in the majority's opinion to support its action and respectfully submit none exists. The Commission had concluded that approval of the applications would result in greater rail competition, better service, greater car supply and lower rates for the

industries on the Port District property. All of these conclusions are supported by the findings set out in the report at record pages 1409-1411. Among those findings are the following:

> Lake Calumet Harbor is the major deep water port facility of the Port of Chicago; Port District facilities and industries have unparallelled access to all modes of transportation, including complete access in the immediate future to ocean transportation; operators of the facilities at Lake Calumet Harbor unanimously forecasted that when the Seaway was completed there would be material increases in tonnages; there will be an important increase in the size, capacity and number of vessels engaged in Great Lakes overseas cargo transportation; the Port of Chicago will become a dominant gateway for grain moving abroad; such a volume of shipping will necessitate a substantially broadened railroad service to accomplish efficient interchange of cargo between land and water carriers; a large port cannot efficiently operate without adequate supporting rail facilities; the combined yard capacity of applicants is more than twelve times that of Rock Island; direct service is faster, requires less handling, and is less expensive because of elimination of switching charges now absorbed on line-haul traffic; large additions to the District's facilities are planned for early construction; therefore, it is imperative at the very beginning of the new era of development that a plan and system for handling the port's transportation needs be established which will assure the service expected and will provide for steady progress and expansion.

The above cited findings, we submit, very plainly support the Commission's conclusions and it was error for the court to hold otherwise. As repeatedly stated, the majority gives no basis for its action on this issue of public need for the service. It seems evident that the lower court simply substituted its judgment for that of the Commis-

sion. This is contrary to what Congress intended and to what this Court has consistently said with respect to the statutory obligations of the Commission and the functions of courts of review.

As stated in *United States* v. *Detroit & Cleveland Nav. Co.*, 326 U.S. 236, at page 241:

> . . . The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 89 L ed. 2051, 65 S. Ct. 1490. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies. . . .

The Commission's conclusion that the service proposed by applicants is required by public convenience and necessity is entitled to the same respect as its expert judgment on other complicated transportation matters. *United States* v. *Detroit & Cleveland Nav. Co.*, 326 U.S. 236, 241, *supra*, *Chesapeake & O.R. Co.* v. *United States*, 283 U.S. 35, 42. Here, the lower court very clearly usurped the Commission's role and in doing so exceeded the proper limits of judicial review.

In somewhat similar circumstances, this Court, in *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 536, said:

> We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true, as the opinion stated, that ". . . the courts must in a litigated case, be the arbiters of the paramount public interest," [Footnote

> omitted] This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. *It cannot substitute its own view concerning what should be done,* whether with reference to competitive considerations or others, *for the Commission's judgment* upon matters committed to its determination, if that has support in the record and the applicable law. (Emphasis added).

We respectfully submit that the majority in the instant case misconceived its function as did the lower court in the *Pierce Auto* case and that the Commission's judgment in this case has support in the applicable law and is supported by the record. See also *Interstate Commerce Commission* v. *Mechling,* 330 U.S. 567, 574.

The "support in the record" need only be support in terms of substantial evidence to uphold the judgment and order. See Section 10(e) of the Administrative Procedure Act. The support need not be the "ample support" apparently required by the lower court. Substantial evidence is something less than the weight of the evidence and "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *National L. R. Bd.,* 305 U.S. 197, 229. The Commission's conclusion was fully supported by substantial evidence despite the lower court's determination to the contrary.

It is impossible to determine from the majority opinion the reasoning that impelled it to overturn the Commission's decision on this issue of convenience

and necessity, but if it felt the Commission, in balancing the evidence, reached the wrong concluion, it would still be erroneous for the court to substitute its judgment for that of the Commission. "The possibility of drawing either of two inconsistent inferences from the evidence did not prevent the Board drawing one of them, as the court below seems to have thought." *Nat. Lab. Rel. Bd.* v. *Nevada Consol. Copper Corp.*, 316 U.S. 105, 106.

The majority's action in overruling the Commission on the issue of public convenience and necessity plainly transgresses the very limited bounds which this Court has long held circumscribes the permissible inquiry by a reviewing court.

II. Rock Island and Nickel Plate Were Not Denied Due Process by the Commission's Refusal to Grant Hearings on the Supplemental Applications.

In the lower court's opinion, the Commission's failure to grant a hearing to Rock Island and Nickel Plate with respect to the supplemental applications and the final operating plan within the Port District "by which they were bound" denied them due process of law (R. 1420). These appellants respectfully urge that the court's conclusion is erroneous.

It is evident from the Commission's report and the lower court's decision that applicants from the outset made known their desire to provide service to the Port District's facilities. Although the applications did not include requests for authority to operate within the Port District because applicants thought such authority unnecessary, the answers to various portions of the applications made it plain that such direct service was contemplated (R. 3, 77).

In addition, applicants intentions were announced very early in the proceedings, through counsel and by introduction of evidence regarding proposed operations within the port (R. 675, 676). The protesting railroads had full opportunity to cross examine and offer evidence with respect to the proposed lease agreement and other arrangements relating to the service proposed (R. 793). There was no surprise or lack of actual notice. Indeed, the protesting railroads were not entitled, as a matter of right, to have any notice or be accorded any hearing. Section 1(18) of the Interstate Commerce Act covers applications for construction of new lines of railroad, and paragraph (19) of that Section provides that applications and issuance of certificates shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe. The only notice requirement under the latter subsection is that a copy of the application shall be served upon the governor of each state in which the extended line of railroad is to be constructed or operated. The other pertinent section is Section 20a(6) which provides that the Commission may hold hearings, if it sees fit. Clearly, the statute does not require the Commission to hold hearings in Section 1 (18) matters. *Woodruff* v. *United States,* 40 F.Supp. 949 (D. Conn.); *Brotherhood of Locomotive Engineers* v. *United States,* 217 F. Supp. 98 (D. Ohio).

Rock Island and Nickel Plate were accorded a full hearing on the essentials of applicants' proposed plan of operation within the port and the Commission was not required to hold additional hearings on the details of the modified rental formula.

We believe the lower court also erred in concluding that Rock Island and Nickel Plate are bound by the final operating plan. The record shows that Rock Island has operated

and continues to operate over Port District tracks under an agreement with the district which has not been presented to the Commission for its approval, presumably on the ground that Rock Island believes such authority is not required. If Rock Island's agreement is more advantageous than applicants' there would appear to be no reason to change it; if less desirable, Rock Island could become party to the revised lease agreement and benefit therefrom. It is difficult to see how the revised lease agreement can operate to Rock Island's detriment. So far as Nickel Plate is concerned, it reaches the port through connection with the Rock Island and apparently does not contemplate direct service. Consequently, there seems no need for it to become party to the agreement. The district court's conclusion that appellees are "bound" by the revised lease agreement is not supported by the record or logic.

Whether a further hearing should be granted or denied is a matter for the Commission to decide in the exercise of its discretion and only to the clearest case of abuse of such discretion will the courts overrule the administrative determination. *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514, 515 (1944); *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 534, 535. The circumstances in this proceeding do not justify a reversal of the Commission's conclusion that further hearing was not necessary or desirable.

It is plain from the Commission's report and the lower court's decision that applicants, from the outset, demonstrated their desire to provide service to the district's facilities, that the protesting railroads cross-examined and offered evidence regarding the proposed lease agreement, that the only change of any significance in the agreement proposed and the revised agreement, was one which bene-

fited the railroads. In any event, the revision apparently will have no effect upon Rock Island or Nickel Plate because they are not parties to that agreement and, presumably, will have no occasion for becoming parties thereto in the future. The conclusion of the lower court that those two railroads were denied due process of law seems clearly erroneous.

III. Any Further Hearing Should Be Confined to the Modified Use Agreement.

As indicated, the lower court treated the issues in this case in two categories—first, the question of whether there was substantial evidence to support the Commission's conclusion that public convenience and necessity warrant approval of the applications up to the boundary of the Port District; and, second, whether the supplemental orders granting approval to operate within the Port District should be vacated because entered without due process to the plaintiffs (R. 1413, 1418). Then, despite its separate treatment of the issues, the majority concludes that a rehearing is required upon all the issues because the rail services up to the Port District's boundaries cannot be considered apart from the operation within the District. This conclusion, we submit, is erroneous.

The first issue is primarily a question of whether shippers and their customers need and would benefit from the proposed service. These shipper interests represent the public interest whose transportation requirements and conveniences are sought to be satisfied. They have virtually no interest in the lease rental arrangements between the Port District and the railroads. However, the effect of the majority decision is to force the interested public parties; *i.e.*, the terminal operators, the grain elevator operators, the Port District, the boards of trade and commerce

and the agriculture secretary to re-present (some nine years later) the public side of the case because the private "rights" of the protesting railroads *may* be affected.

The two issues are clearly severable and the majority goes too far when it disregards the public interest, which is paramount, in favor of the questionable interests of Rock Island and Nickel Plate. There is no justification in this record, in the applicable law or in policy considerations for the majority's requirement of rehearing on all the issues.

Appellants urge that if this Court agrees with the lower court on this second issue, its order remanding the cause should confine the further hearing to the terms and conditions of the revised lease agreement and should not extend to a further hearing on all the issues raised in this proceeding as decreed by the district court.

CONCLUSION

We submit that the judgment of the lower court is erroneous and should be reversed. The case should be remanded to the district court with instructions to dismiss the complaints and affirm the Commission's decision.

Respectfully submitted,

CALUMET HARBOR TERMINALS, INC.,
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Due: August 25, 1966

APPENDIX.

National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding Sections 1, 301, 901, 1001, and 1231:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of the Act [chapters 1, 8, 12, 13, and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act [chapters 1, 8, 12, 13, and 19, of this title] shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 1(18) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1(18) provides:

No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter

over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

Section 5(2) of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. §5(2), provides:

Unifications, mergers, and acquisitions of control. (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which

is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable * * *.

* * * * *

Section 10(e) of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009(e), provides:

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.